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December 17, 1996

Ms. Mary L. Cottrell, Secretary
Department of Public Utilities
100 Cambridge Street, 12th Floor
Boston, MA 02202

**Re: Massachusetts Electric Company**
**D.P.U. Docket No. 96-25**

Dear Ms. Cottrell:

Enclosed please find an original and sixteen (16) copies of Initial Brief of Wheelabrator Environmental Systems Inc. along with a Certificate of Service relative thereto. I have also enclosed a diskette for your convenience.

Please date stamp a receipt copy and return it to the waiting messenger.

Thank you for your attention to this filing.

Very truly yours,

Christopher T. Katucki, P.C.

CTK/ljb
Enclosures

cc: Mr. Ronald F. LeComte, Hearing Officer
Lawrence W. Plitch, Esq.
Mr. William C. Sheehan
Paul R. Gauron, P.C.
Joshua S. Goodman, Esq.

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COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF PUBLIC UTILITIES

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| Petition of Massachusetts Electric Company | ) | D.P.U. 96-25 |

**INITIAL BRIEF OF WHEELABRATOR ENVIRONMENTAL SYSTEMS INC.**

Wheelabrator Environmental Systems Inc. ("Wheelabrator") submits this brief to highlight its concerns as a creditor of New England Power Company ("NEP") about certain aspects of the Restructuring Settlement Agreement ("Settlement Agreement"). Specifically, Wheelabrator, whose projects are independent power producers and suppliers of waste disposal services to numerous communities, is concerned that existing creditors of NEP face an increased risk of nonpayment and default by NEP because upon divestiture, NEP ("New NEP") will be a far leaner company with an unknown business future. The solution to this problem is to adopt the proposal made by Wheelabrator to create a trust -- known as the Variable Component Trust -- to protect certain classes of creditors such as nuclear decommissioning costs, employees, IPP's and towns owed property taxes. The trust will not cost rate payers a penny more and creditors will be deservingly protected. Adoption of the trust is also consistent with the Department's guidelines in DPU 95-30 that existing commitments be honored and that the transition to a competitive industry structure be orderly.

## A. BACKGROUND

Wheelabrator (or affiliates) are owners and operators of three trash to energy facilities serving at least 67 communities in Massachusetts. Each of Wheelabrator's three Massachusetts facilities are Qualifying Facilities under the Public Utility Regulatory Policies Act ("PURPA").[1] As such, Wheelabrator's facilities are independent power producers and parties to three long term power supply contracts with NEP. Wheelabrator takes no position with regard to the general elements of the divestiture plan outlined in the Settlement Agreement. Wheelabrator is solely concerned with the credit risk it will face as NEP becomes New NEP. Wheelabrator entered into power contracts with a large integrated utility that was financially strong and that had a clear customer for its power, that is, Massachusetts Electric Company ("MECO"). In reliance on this state of affairs, Wheelabrator invested in and built various facilities, issued long-term debt to bondholders, and entered into solid waste disposal commitments with a number of communities in Massachusetts. The state of affairs still exists today. The power sales and related revenues are a significant factor in the price paid by communities for disposal services at waste to energy facilities. The Settlement Agreement contemplates a possible bifurcation of Wheelabrator's rights between an unknown buyer of Wheelabrator's contracts and its current customer, New England Power, and a divesture by NEP of its most marketable assets. As a result, Wheelabrator faces unanticipated changes and significantly greater credit risk.

The Department has stated its strong support for honoring all prior stakeholders commitments as part of the divestiture process. Wheelabrator has proposed the creation of a trust to assure that the Access Charge paid by MECO's rate payers will be used for its intended purpose and to provide

[1] QF Certificate Numbers:

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| Wheelabrator Millbury Inc. | QF 86-175-000 |
| Saugus Refuse Energy Company, L.P. | QF 83-348-001 |
| Massachusetts Refusetech Inc. | QF 83-373-000 |

comfort to Wheelabrator and communities that it serves that its contracts will be honored and that payments to it (and to other similarly situated creditors -- not just IPP's) will be made without some sort of skip or bankruptcy. There has been discussion about stranded costs in this and other Department proceedings relating to the restructuring of the industry. Wheelabrator does not want to become a stranded creditor as a result of this effort.

**B. AFTER DIVESTITURE, NEW NEP IS AN UNKNOWN QUANTITY**

Little is known about the fate of NEP after divestiture. New NEP will be primarily engaged in the transmission business. Testimony of Jesanis; November 22, 1996 Transcript at 12. It is likely to retain NEP's nuclear assets which may be more a liability than an asset. Testimony of Jesanis, November 22, 1996 Transcript at 12-13. Even the transmission assets might be undesirable if there is an "EMF scare." Testimony of Jesanis, November 22, 1996 Transcript at 48. It is not even clear that NEP will own the transmission business in the future. Testimony of Sergel, November 22, 1996 Transcript at 72. No business plan exists that might portend New NEP's future. Testimony of Jesanis; November 22, 1996 Transcript at 50-51.

In short, the record shows that NEP is voluntarily shedding itself of large amounts of assets and terminating a long term supply contract with MECO and that New NEP is welcoming the new era of competition without a disclosed business plan. Creditors of NEP have a right to be concerned.[2]

**C. THE VARIABLE COMPONENT IS DESIGNED TO PROTECT CREDITORS**

The Department presciently anticipated this creditor concern (and the

[2] Creditworthiness was viewed by the Department as a legitimate concern for Boston Gas in evaluating suppliers. See DPU 96-50, Order dated November 29, 1996, p. 376. Here, suppliers are concerned about the credit of the utility.

potential disruptive effects this concern might have during transition) in DPU 95-30 when it enunciated the principle "Honor existing commitments" as one of the guideposts to any restructuring. DPU 95-30 as well as the Settlement Agreement are intended to provide New NEP with the ability to fully meet its preexisting commitments to creditors. Under the Settlement Agreement, as part of its stranded cost recovery, NEP is entitled to full recovery for payments it must make to power suppliers with above market contracts.[3] The portion of the Access Charge relating to the Variable Component of the Contract Termination Charge covers these payments. Book 2, Page 56. The Variable Component is not limited to IPP's claims; it also includes nuclear decommissioning costs, employee severance and retraining, payments to towns in lieu of taxes and certain other claims (collectively "V/C Claims").

In brief, the purpose of the V/C is to provide an income stream to make payments on account of creditors of NEP that will be impaired over time by the sell off by NEP of substantial assets. NEP has no independent right to the V/C. If the V/C Claims did not exist, NEP would have no entitlement to the V/C. The Variable Component constitutes "earmarked" funds; NEP is essentially a conduit for their payment to holders of V/C Claims. Testimony of Plitch; December 10, 1996 Transcript at 79-81.

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[3] It is useful to note that at the time of contracting the price for power under these long term contracts was based on NEP's then anticipated future cost for power.

**D. NEP IS SEEKING TO USE THE VARIABLE COMPONENT AS COLLATERAL TO RAISE MONEY TO PAY SHAREHOLDERS AND OTHER CLAIMS**

NEP has taken away the protections afforded holders of V/C Claims by seeking authority to pledge the V/C to lenders and other third parties in order to raise money. There is no limit on the amount of the borrowing other than the value of the termination charges, which could equal 3 billion dollars. Testimony of Jesanis; November 22, 1996 Transcript at 54. There is no limit on the purposes of the borrowing and NEP is unwilling to accept any restrictions on use. Testimony of Jesanis; November 22, 1996 Transcript at 60-62. Indeed, funds can be borrowed and used to pay shareholders before creditors are paid in full. As set forth in Attachment 13 to the Settlement Agreement:

> The proceeds of the Indebtedness [may] be used for the purpose of capitalization of NEP and/or the retirement of existing common stock, preferred stock, bonds, and short-term indebtedness.

Offer of Settlement, Book 3, Page 235 (Emphasis Added).

NEP's proposed use of the V/C for other purposes is wrong. Clearly shareholders should not be paid ahead of creditors -- that would stand on its head normal payment priorities. Testimony of Plitch; December 10, 1996 Transcript at 119-120. Moreover, there is no compelling reason why NEP should be entitled to play arbitrage with a cash stream intended to pay V/C Claims that happens to flow through NEP's bank account. Those funds are designed to pay various classes of creditors and should not be made available for some other purpose. Otherwise, as admitted by NEP in testimony, these creditors are at risk:

> Q: But you are prepared to [give bondholders] the cash flow from the variable component of the termination charge which relates to those contracts?

A:[JESANIS] We are establishing that the bondholders - The bondholders have a senior position and they are more likely to stay in the deal if they need to if their senior position is upheld. What the bondholders want to make sure more than anything else is if they don't get paid, nobody gets paid.

Q:So they're worried?

A:[JESANIS] I would assume they're worried, if I were them. We've been downgraded. I assume that reflects a worry on the rating agency's part that things aren't quite what they used to be.

Q:So if they're worried [about being paid, then Wheelabrator] should be worried. Is that right?

A:Oh, absolutely.

Testimony of Jesanis; November 22, 1996 Transcript at 49-50.

Q:Which would mean that [under NEP's proposal] in the worst-case scenario, that new lender would have rights to the variable component of the access charge before the independent power producers did. Is that correct?

A:[JESANIS] In a worst-case scenario, that's correct.

Id. at 62.

## E. THE PLEDGE OF THE VARIABLE COMPONENT IS NOT NECESSARY TO RETIRE EXISTING DEBT

NEP asserts that it must pledge the V/C in order to raise funds to pay off existing liens on assets held by bondholders under its 1977 Trust Indenture. Testimony of Jesanis; November 21, 1996 Transcript at 240-42, November 22, 1996 Transcript at 25. This argument is without merit for three reasons. First, the lien of the Indenture specifically excludes contracts such as the power agreements. Testimony of Jesanis; November 21, 1996 Transcript at 228-29, November 22, 1996 Transcript at 21-22; Indenture at 10-11(CPC Exhibit 1). Accounts receivable and proceeds from those contracts are also excluded. Testimony of Jesanis; November 21, 1996 Transcript at 228-29; Indenture at 10-11. Accordingly, the bondholders have no current entitlement to that portion of the V/C that constitutes proceeds of the power agreements.

Second, NEP need not pay bondholders in full in order to obtain a release of the lien encumbering the generation plants to be sold as part of the Settlement Agreement. Section 6.03 of the Indenture requires the Bond Trustee to release its lien on property if its sold for fair value and the cash received from the sale is paid over to the Bond Trustee. CPC Exhibit 1 (Indenture at 99-101). Consequently, there is no need to provide additional collateral or raise additional funds to pay off existing bonds so long as the proceeds from the sale are turned over to the Bond Trustee.

Finally, as a practical matter and as the testimony of Wheelabrator demonstrates, NEP will have more than ample collateral and/or sale proceeds to satisfy existing liens. The charts submitted into evidence by Wheelabrator set forth in detail the amount of secured debt that could be retired upon the sale of only the steam and hydro assets of NEP. In fact, a sale at merely 79% of book value of those assets would be sufficient to retire all secured debt. Sheehan Testimony, December 10, 1996 Transcript at 69; Wheelabrator Exhibit 5. A sale at 79% of book value realizes $201 per kilowatt of capacity sold. Id. In contrast, the cost of new capacity is between $600 per kilowatt to $800 per kilowatt. Testimony of Sheehan, December 10, 1996 Transcript at 68. NEP has good prospects of realizing sufficient funds to retire its debt; it does not need additional collateral.

Even if sufficient funds were not realized, NEP has sufficient collateral to raise adequate amounts without a pledge of the V/C. Wheelabrator Exhibits 6 and 7 (copy attached) and the testimony of Sheehan is instructive. That exhibit calculates a debt to collateral ratio taking into account only the transmission assets (which are not being sold) and the present value of the Contract Termination Charges excluding the V/C. In all instances the coverage ratio equal or exceeds the ratio enjoyed by bondholders today, even if the assets sold for nothing. Sheehan testified that debt coverage ratios he calculated were sufficient to raise enough money to pay off existing secured debt. Testimony of Sheehan; December 10, 1996 Transcript at 71-75.

NEP's claim that its needs the lien on the Access Charge to make the divesture happen is a smoke screen to obtain unprecedented borrowing authority.

**F. UNDER G.L. C. 164, SECTION 14 THE BORROWING AUTHORITY REQUESTED IS OVERLY BROAD**

NEP is seeking broad authority under the Settlement Agreement to borrow money and to pledge the Contract Termination Charges as collateral. Offer of Settlement, Book 1, Page 51, Book 3, Attachment 13. The amount at issue could total 3 billion dollars. The authority sought is highly improper as NEP has failed to meet the required burden of proving that such an arrangement is reasonably necessary for a public purpose as required by M.G.L. c. 164, §14.

M.G.L. c. 164, §14, requires NEP to obtain approval of the Department in order to assume any financing obligations, including the issuance of bonds.[4] The Department may approve such financing arrangements only if NEP affirmatively demonstrates the proposed financing is "reasonably necessary." M.G.L. c. 164, §14. More specifically, the financing must be "reasonably necessary for the accomplishment of some purpose having to do with the obligations of the company *to the public* and its ability to carry out those obligations with the greatest possible efficiency." Fitchburg Gas and Electric Light Co. v. Department of Public Utilities, 394 Mass. 671, 678 (1985) (emphasis added). Section 14 does not authorize the Department to approve financing based on evidence that it is reasonably necessary for the business interests of the electric company making the request. Lowell Gas Light Co. v. Department of Public Utilities, 319 Mass. 46, 52 (1946). In making its determination, the Department may take into consideration any resources available to the company and any resources which might have been available, including the existence of other lenders and other types of financing. Fitchburg Gas and Electric Light Co. v. Department of Public Utilities, 395 Mass. 836, 843, FN. 9, (1985).

NEP has failed to demonstrate that the public interest will be served by its broad request. It has the burden to do so. See Fitchburg Gas and Elec. Light Co., 395 Mass. at 843 (burden of proving reasonable necessity is on company requesting authorization to issue debt instruments). NEP has set

[4] Specifically, the statute states:

Gas and electric companies shall issue *only* such amount of stock and bonds, and of coupon notes and other evidences of indebtedness payable at periods of more than one year after the date thereof, as the department may from time to time vote is reasonably necessary for the purpose for which such issue of stock, bonds, coupon notes or other evidences of indebtedness has been authorized. The department may take into consideration *any resources of the companies available or which might have been available* for said purpose. . . (Emphasis added).

forth no justification for the expansive borrowing authority it seeks and as a result that portion of the Settlement Agreement cannot be approved.

**G.WHEELABRATOR IS ENTITLED TO PROTECTION OF ITS CLAIM AGAINST NEP**

Approval of the Settlement Agreement will expose Wheelabrator to an increased risk of nonpayment and default by NEP because New NEP will be an enterprise with an unknown business future that is far different from the company with which Wheelabrator contracted and which, as these proceedings demonstrate, could not sell off assets as proposed without DPU approval. Under such circumstances, Wheelabrator is entitled to receive "assurances" that NEP can perform under the power contracts. This right is summarized in section 251 of the Restatement (Second) of Contracts which provides:

> (1)Where *reasonable grounds* arise to believe that the obligor will commit a breach by non-performance that would of itself give the obligee a claim for damages for total breach under §243, the obligee may demand adequate assurance of due performance and may, if reasonable, suspend any performance for which he has not already received the agreed exchange until he receives such assurance. (2) The obligee may treat as a repudiation the obligor's failure to provide within a reasonable time such assurance of due performance as is adequate in the circumstances of the particular case.

(Emphasis added); see also Teletransmissions, Inc. v. David, 5 Mass.App.Ct. 864-65 (1977) (citing §251 favorably).

If Wheelabrator has reasonable grounds to believe that NEP may be unable to make its required payments, it is entitled to demand that NEP take additional action to assure future performance. Wheelabrator entered into power contracts with a large integrated utility that was financially strong and that had a clear customer for its power, that is, Massachusetts Electric Company ("MECO"). In reliance on this state of affairs, Wheelabrator invested in and built various facilities, issued long-term debt to bondholders, and entered into solid waste disposal commitments with a number of communities in Massachusetts. Under the Settlement Agreement NEP has voluntarily agreed to sell its most marketable assets, exposing creditors to increased credit risk. Further, NEP wants significant borrowing authority and to pledge the V/C, but has no disclosed business plans for its future. Testimony of Jesanis; November 22, 1996 Transcript at 50-51. Such circumstances call for protection of Wheelabrator through the adoption of the V/C Trust.

Such relief is also consistent with the policies underlying PURPA. PURPA was enacted to encourage development of co-generation and small power production facilities and to eliminate significant barriers to the development of these alternative energy sources. Freehold Cogeneration Assoc. v. Board of Regulatory Commissioners of the State of New Jersey, 44 F.3d 1178, 1190-91 (3d Cir. 1995), cert. denied, 116 S.Ct. 68 (1995); Smith Cogeneration Management, Inc. v. Corporation Commission, 863 P.2d 1227, 1241 (Okla. 1993). "Certainty of contract and protection of power rates" in favor of the IPP free of any state regulatory risk is one of the protections afforded by PURPA. As noted in the FERC preamble to its regulations:

> The import of this section is to insure that a qualifying facility which has obtained the certainty of an arrangement is not deprived of the benefit of its commitment as a result of changed circumstances.

863 P.2d at 1240. Similarly, FERC noted in its New York State Electric and Gas Corporation decision:

> QFs bear development risks not experienced to the same extent by traditional utilities. As a result, they must rely on their power purchase agreements to obtain project financing, and we have recognized the importance of contractual reliance for this purpose. If we were to grant the relief requested by

NYSEG . . ., financeability of such projects would be severely hampered. Such result is not, in our opinion, consistent with Congress' directive that we encourage the development of QFs.

71 F.E.R.C. ¶61027, aff'd, 72 F.E.R.C. ¶61067. The FERC decision noted that IPPs also deserve certainty of contract on the same grounds that utilities often cite for recovery of stranded costs; that is, that such costs are the product of settled and reasonable investor expectation and should be honored. Id.

Echoing the concerns of FERC, the Department observed in DPU 95-30 that existing commitments should be honored "because the reliability of commitments in general is an essential element in any future industry structure." DPU 95-30, August 15, 1996 at 35.

It is arguable that state Public Utility Commission, such as this Department, are devoid of authority to approve a utility divestiture plan such as that proposed in the Settlement Agreement if the clear affect of that plan is to impair the relationship between PURPA QFs and the ultimate consumers of the QF's power. PURPA clearly rests on a scheme of "sales for resales". 16 U.S.C. §824-3(a). Further, that PURPA rests on the bedrock of the QF-retail consumer relationship is borne out by the fundamental tenant of PURPA that the rates for purchase of an electric utility must be "just and reasonable to the electric consumers of the electric utility." 16 U.S.C. §824(a)-3(b)(1).

Finally, under PURPA, Wheelabrator's ability to enforce its contract with NEP cannot be impaired by an order of the Department, and the Department has no authority to revise that obligation. Freehold Cogeneration Assoc., 44 F.3d at 1192; Smith Cogeneration Management Inc., 863 P.2d at 1240; Independent Energy Producers Association, Inc. v. California Pub. Utils.

Comm'n, 36 F.3d 848, 854 (9th Cir. 1994).

The Department should take steps to insure that PURPA's policies are honored and that by approving the Settlement Agreement it does not impair Wheelabrator's contractual rights and thus do indirectly that which is directly prohibited by PURPA. The Settlement Agreement substantially impairs the rights of Wheelabrator since its credit risk is materially increased and the V/C -- the funds earmarked for IPPs -- are subject to pledge and assignment. However, if the Department conditions approval of the Offer of Settlement upon the creation of the Variable Component Trust, the rights of Wheelabrator and other holder of V/C Claims will be preserved, not impaired. The risk of a settlement in violation of PURPA will be eliminated. The principle of honoring existing commitments will be enhanced. Litigation that could delay or undermine the restructuring process will be avoided.

**H. TO PROTECT THE RIGHTS OF ALL V/C CREDITORS, THE DEPARTMENT SHOULD CONDITION SETTLEMENT ON ACCEPTANCE OF THE WHEELABRATOR TRUST PROPOSAL**

The Variable Component of the Contract Termination Charge is directly related to that portion of stranded costs consisting of above market payments to power suppliers, nuclear decommissioning costs, above market fuel transportation costs, employee severance, payments in lieu of taxes, and certain other claims. Offer of Settlement, Book 2, Page 55-61. The purpose of the V/C is to provide an income stream to make payments on account of the V/C Claims. If the V/C Claim did not exist, then NEP would have no right to this stream of payments. Thus, the V/C is a "flow through" or "conduit" payment much in the same way as are sales taxes collected by a retailer. Testimony of Plitch, December 10, 1996 Transcript at 83. These funds are not in any equitable way "property" of MECO or NEP.

Wheelabrator proposed, at the hearings on December 10, 1996, the creation of the Variable Component Trust as a structure to provide assurances to holders of V/C Claims that these funds will be available to pay V/C Claims when due and that such funds would not be used to pay other creditors or stockholders or dissipated in some other fashion. At present, NEP is seeking authority to pledge the V/C to raise money for ordinary working capital, to pay shareholders, and to pay bondholders. <u>See</u> Offer of Settlement, Book 3, Attachment 13. NEP's proposed use of the V/C is improper because NEP is receiving the V/C money to "reimburse" NEP for payments it makes to third parties. The earmarked funds should be protected so that they are available to meet their intended purpose. Otherwise, consumers of electricity will have paid an Access Charge to reimburse NEP for payments it may never make - unintentionally or otherwise. This is unfair to consumers and to holders of V/C claims.

In order to make sure that money is there to pay V/C Claims when they become due, the V/C Trust proposed by Wheelabrator will collect the cash flow from the Access Charge related to the V/C. The trust will hold these funds for the benefit of holders of V/C Claims. In that way these funds will be available to pay the claims that give rise to the V/C in the first place.

The beneficiaries of the V/C Trust would be all holders of V/C Claims, not just power suppliers.[5] The portion of the Access Charge relating to the V/C would be owned by the Trust not MECO or NEP much like sales tax

[5] It is not critical that all V/C claimants be beneficiaries of the V/C Trust. The inclusion of some claims may be unworkable. The concept, however, is to include as many creditor groups as feasible.

collections are not “owned” by the retailer. MECO would act as a collection agent and turn the proceeds over to the V/C Trustee on a periodic basis, most likely every month. If NEP had made a prior payment to a V/C claimant, then NEP would have a claim against the Trust as an assignee or by subrogation.[6] As additional protection, the Trust would also receive a lien on the V/C portion of the Access Charge to secure the payment by MECO and NEP of the Access Charge.

From the Trust, the fees and expenses of the Trustee would be paid first. Thereafter, all beneficiaries would share pro rata.

The trust arrangement is not unusual. It is essentially an escrow arrangement. Sheehan testified on various commercial practices where similar devices are used. Testimony of Sheehan, December 10, 1996 Transcript at 85-86.

As noted in the testimony of Wheelabrator and in the law discussed above, the trust is not an attempt to improve a creditors position in the face of the status quo. Rather, it is a an equitable effort to fairly respond to an extraordinary Settlement Agreement consented to by NEP which does or should earmark funds for V/C Claims. As noted by Mr. Plitch in his testimony:

A:[PLITCH] I think it’s important to debunk the charge, if you will, that this is somehow an attempt by claimants such as Wheelabrator to improve their position. Clearly, Wheelabrator entered into a power contract or power contracts with an integrated regulated utility. There’s now a proposal pending before this Department to change the status quo in a way that has the potential to significantly undermine the creditworthiness of the entity that we’ve entered into a contract with. We are not seeking any improvement in our position; we are simply trying to maintain the status quo.

[6] It is not clear from the Settlement Agreement whether the payment of the V/C portion of the Access Charge is conditioned on a corresponding payment by NEP to the V/C Claimant. With a Trust in place, the terms of the Access Charge should provide that it is payable on all amounts in fact owed by NEP to holders of V/C Claim. This assures that funds will indeed exist to honor existing commitments.

And I might add that the proposal by New England Power to increase the assets that the current bondholders have a security interest in could just as easily be argued to be an improvement in position. If you analyze Attachment 13 fully, it's arguable that they are seeking to dividend monies to their shareholder, New England Electric System, and borrow money to do that, accomplish that purpose, and have these components of the access charge pledged as security for that - arguably [is an] improvement in the position of the shareholders of New England Electric.

Testimony of Plitch; December 10, 1996 Transcript at 87-88.

## I. THE DEPARTMENT SHOULD CONDITION APPROVAL OF THE SETTLEMENT ON FOUR GROUNDS

Approval of the Settlement Agreement should be conditioned as follows:

1. require that sale proceeds first be used to pay down pre-existing secured debt and to obtain a release of pre-existing liens;

2. limit borrowing authority of NEP to amounts needed to refinance pre-existing secured debt not otherwise paid off through sales proceeds;

3. prohibit the pledge or assignment of V/C except to the V/C Trust (see 4 below);

4. adopt Wheelabrator's V/C Trust proposal and require direct payment of the V/C portion of Access Charge to the Trust, with the V/C to be based on amounts owed by NEP.

**CONCLUSION**

For the reasons stated, Wheelabrator request that the Settlement Agreement be conditionally approved subject to the conditions in the preceding section of this brief.

**WHEELABRATOR ENVIRONMENTAL SYSTEMS INC.**

By its attorneys,


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*Dated: December 17, 1996*

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